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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1981

NO. 81 6304

ROGER COLLINS,

Petitioner,

-v-

WALTER D. ZANT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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March 2, 1982

QUESTIONS PRESENTED

I. Whether the Georgia Supreme Court's reaffirmance of Petitioner's death sentence following a Godfrey remand cured the defects in the trial court's sentencing instructions or the Georgia Supreme Court's inconsistent standard of review of death sentences based upon Ga. Code Ann. §27-2534.1(b)(7).

II. Whether, under the Eighth and Fourteenth Amendments, the Georgia capital sentencing scheme must require the sentencer to make findings concerning mitigating circumstances in order to make the process for imposing a death sentence rationally reviewable.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

The Petitioner, ROGER COLLINS, prays that a writ of certiorari issue to review the final order of the Supreme Court of Georgia denying review of the order of the Superior Court of Butts County, Georgia in state habeas corpus proceedings. The final order of the Supreme Court of Georgia was entered on December 3, 1981, and the order of the Superior Court of Butts County was entered on August 21, 1981.

OPINION BELOW

The Supreme Court of Georgia did not render an opinion herein. Rather, that court denied review of the opinion of the Superior Court of Butts County. The Supreme Court order denying review is attached hereto as Appendix B. The Superior Court's opinion is unreported and is attached hereto as Appendix A.

JURISDICTION

The final order of the Supreme Court of Georgia was

entered on December 3, 1981. By operation of Georgia law, the judgment of the Superior Court of Butts County was thereby allowed to stand as the final judgment on Petitioner's state habeas corpus proceedings. A petition for rehearing was not filed in the Supreme Court of Georgia. This Court's jurisdiction to review by writ of certiorari is invoked under 28 U.S.C. §1257 (3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

(1) This case involves the Eighth and Fourteenth Amendments to the United States Constitution.

(2) This case further involves the provisions of the Georgia death penalty statute, Ga. Code Ann. §27-2534.1, et seq. The provisions of the statute relevant to this Petition are set forth as Appendix C to this petition.

STATEMENT OF THE CASE

On the night of August 6, 1977, Roger Collins and two other men, William Durham and Johnny Styles, were driving about their neighborhood in Warner Robins, Georgia, when they offered a ride to a young woman who was a friend of theirs, Delores Luster. (T, 88-90)[1] These men and Ms. Luster drove around for some time thereafter, stopping on one occasion at a grocery store, whose clerk noted that Ms. Luster "seemed relaxed" with her male companions. (T, 90-92; 75, 79; 144-145) After leaving the store, Ms. Luster and her three male companions proceeded to a pecan orchard in rural Houston County where Mr. Collins, Mr. Durham, and Mr. Styles each had sexual intercourse with Ms. Luster. (T, 92-99, 112-117) While engaging in intercourse with

[1] References to the transcript of Petitioner's "Trial and Sentence Proceedings" are noted as "T."

Mr. Collins, Ms. Luster appeared to be engaged in consensual sexual relations. (T, 99, 152) However, when both Durham and Styles engaged in intercourse with Ms. Luster thereafter, she began complaining and made it clear that she was no longer voluntarily engaging in sexual relations. (T, 152-157)

Following the sexual relations, William Durham took Ms. Luster by the hand and led her off into the shadows of the pecan orchard. (T, 118) Prior to that time, Durham had been telling Styles how he planned to kill Ms. Luster, and both Styles and Collins urged Durham not to do such a thing. (T, 113-114, 119, 165) When Durham and Ms. Luster walked to the orchard, Mr. Collins followed them, but was ordered by Durham to retrieve a tire jack from the trunk of the automobile in which they had been traveling. (T, 119, 160-161, 351) Mr. Collins complied with Durham's order and gave the jack to Durham. (T, 351) Thereafter, Durham beat Ms. Luster on the left side of her head and the left side of her body with the tire jack, causing her death from a skull fracture. (T, 351; 47-49, 54) While Johnny Styles was nearby, he could not see who had actually beaten Ms. Luster, but he noted that Mr. Durham brought the tire jack back from the pecan orchard to the car. (T, 120) Thereafter, the three men disposed of the tire jack and the clothes of Ms. Luster and each returned to his home. (T, 124) By early afternoon of the next day, Johnny Styles had gone to the police, reported what had happened, and he, William Durham, and Roger Collins were arrested. (T, 19-20)

Mr. Collins' trial was held from November 14 through November 17, 1977 in the Superior Court of Houston County (Georgia). (T, 1) In the guilt phase of his trial, the State relied primarily on the testimony of Johnny Styles and on the physical evidence connected with the crime in order to develop a case against Mr. Collins. While the State's case pointed directly

to William Durham as the more culpable of the two defendants, evidence was presented to suggest that Mr. Collins functioned as an active accomplice with respect to both crimes.[2] On behalf of Mr. Collins, his counsel presented no evidence. (T, 298) Thereafter, Mr. Collins was found guilty of murder and rape. (T, 334) At the sentencing phase which followed, on November 17, 1977, the State presented no additional evidence. The only evidence presented on behalf of Mr. Collins was the testimony of Mr. Collins himself. In mitigation, Mr. Collins testified that he had not personally struck or killed Delores Luster (T, 351), and that he had cooperated with William Durham only because he was afraid of Durham, particularly when Durham was wielding a knife as he had on the night of the homicide (id.). Mr. Collins expressed deep remorse for the events leading to Ms. Luster's death. (T, 352) Finally, Mr. Collins testified that he was eighteen years old and had only progressed through part of the eighth grade in school. (T, 349) At the end of this phase of the trial, the jury found two aggravating circumstances against Mr. Collins -- that the homicide had been committed in the course of the commission of rape, and that the homicide was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind -- and sentenced Mr. Collins to death. (T, 383)

On March 6, 1979, the Georgia Supreme Court affirmed Mr. Collins' convictions and sentence of death.[3] On March 29, 1979, the Supreme Court denied a timely motion for rehearing. Collins

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[2] In addition, the State introduced, over Petitioner's objection, two statements made by Mr. Collins to the police. Although the statements were contradictory, and for other reasons should have been suppressed, in one of the statements Mr. Collins admitted that both Durham and he had struck Ms. Luster with the jack. (T, 212-213, 254-255)

[3] Mr. Collins' sentence of fifteen years' imprisonment for his rape conviction was also affirmed.

v. State, 243 Ga. 291, 253 S.E.2d 729.

On August 9, 1979, Mr. Collins tendered for filing a Petition for a Writ of Certiorari in this Court (No. 79-5188). On May 27, 1980, this Court entered the following order with respect to Mr. Collins' petition:

> "The motion of petitioner for leave to proceed in forma pauperis and the Petition for writ of certiorari is granted. The judgment is vacated insofar as it leaves undisturbed the death penalty imposed and the case is remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. ___ (1980)."

446 U.S. 961. On September 8, 1980, on remand, the Georgia Supreme Court adhered to its prior affirmance of Mr. Collins' death sentence. Collins v. State, 246 Ga. 261, 271 S.E.2d 352.

On November 5, 1980, Mr. Collins tendered for filing his second Petition for a Writ of Certiorari in this Court from the opinion of the Georgia Supreme Court on remand. (No. 80-5672) On January 12, 1981, this Court denied certiorari. Thereafter, on March 19, 1981, Mr. Collins filed a petition for a writ of habeas corpus in the Superior Court of Butts County (Georgia). Following proceedings before the Superior Court, the court entered an order, on August 21, 1982, denying Mr. Collins' petition for a writ of habeas corpus. (This order is attached hereto as Appendix A.) Relevant to the questions presented herein, the Superior Court ruled as follows:

> "In paragraph 30 [of the state habeas corpus petition], Petitioner claims the jury instruction on the (b)(7) aggravating circumstance was improper and violated his Eighth and Fourteenth Amendment rights.
>
> "The Supreme Court has already reconsidered Petitioner's sentence in light of Godfrey v. Georgia, supra, and concluded the (b)(7) aggravating circumstance was properly applied. Collins v. State, 246 Ga. 261 (1980). Implicit in the finding that (b)(7) was properly applied would be the fact that the jury charge on (b)(7) was not improper.
>
> "Accordingly, this allegation is found

to be without merit.[4]

* * *

> "In paragraph 36, Petitioner claims constitutional deprivation by the failure of the trial court to require [the jury] to make findings of fact with respect to mitigating circumstances.
>
> There is clearly no such requirement under Georgia's death penalty statute. Accordingly, this allegation is found to be without merit."

Appendix A, at 12-13.

Upon entry of this order, Mr. Collins filed a timely notice of appeal, along with an application for a certificate of probable cause to appeal in the Georgia Supreme Court. However, on December 3, 1981, the Supreme Court denied Mr. Collins' application without opinion. (This order is attached hereto as Appendix B.) Proceedings before this Court were then commenced.

REASONS FOR GRANTING THE WRIT

I. THE GEORGIA SUPREME COURT'S REAFFIRMANCE OF PETITIONER'S DEATH SENTENCE FOLLOWING A GODFREY REMAND DID NOT CURE THE DEFECTS IN THE TRIAL COURT'S SENTENCING INSTRUCTIONS OR THE GEORGIA SUPREME COURT'S INCONSISTENT STANDARD OF REVIEW OF DEATH SENTENCES BASED UPON GA. CODE ANN. §27-2534.1(b)(7)

On May 19, 1980, this Court held that the Georgia Supreme Court had adopted an unconstitutionally broad and vague construction of the aggravating circumstance set forth in the Georgia death penalty statute at Ga. Code Ann. §27-2534.1(b)(7),[5] when it affirmed the death sentence of Robert Godfrey in Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979). Godfrey v. Georgia,

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[4] With the same analysis, the Superior Court concluded that Petitioner's related claim (in paragraph 31 of the state habeas petition) -- that the Georgia Supreme Court failed to review the defective jury instruction on remand, and that it again failed to apply a consistent, limited construction of the (b)(7) circumstance on remand -- was likewise without merit. (See Appendix A, at 12.)

[5] The murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

446 U.S. 420 (1980). At the same time that Godfrey was decided, Petitioner's case was also pending review by this Court. Because Petitioner's request for review had also raised the legitimacy of the application of the (b)(7) aggravating circumstance to his case, the Court granted certiorari, vacated Petitioner's death sentence, and remanded his case to the Georgia Supreme Court for consideration in light of Godfrey. Collins v. Georgia, 446 U.S. 961 (1980). On remand, the Georgia Supreme Court reaffirmed its prior decision and reinstated Petitioner's death sentence. Collins v. State, 246 Ga. 261, 271 S.E.2d 352 (1980). In state habeas corpus proceedings thereafter, Mr. Collins claimed that on remand the Georgia Supreme Court had failed to follow the principles outlined in Godfrey. However, the Georgia courts disagreed, maintaining that Godfrey had been followed.

Thus, Mr. Collins again seeks this Court's review, on the basis that the Georgia courts have continued to uphold his death sentence in the face of Godfrey's clear mandate for reversal. In common with numerous other capital defendants in Georgia, Mr. Collins still faces death, despite two clear violations of the constitutional principles articulated in Godfrey. First (b)(7) was not given an appropriately narrow construction by the trial court in Mr. Collins' case when the jury was instructed concerning (b)(7). Second, on the remand of Mr. Collins' case to the Georgia Supreme Court, that court failed to review the nature of the instructions given to the jury concerning (b)(7) and further, itself failed to apply an appropriately narrow construction of (b)(7) -- consistent with its construction of (b)(7) in other cases -- in the course of its review of the application of that aggravating circumstance to Petitioner's case.

A. A death sentence based upon (b)(7) cannot stand unless (b)(7) was given an appropriately limited construction by the trial court in its instructions to the jury, and that construction was applied on review by the Georgia Supreme Court

Godfrey v. Georgia, 446 U.S. 420 (1980) holds that a death sentence based upon a finding of the aggravating circumstance set forth in (b)(7) cannot stand under the Eighth and Fourteenth Amendments, unless all three of the following conditions are met. First, a limiting construction must be placed upon (b)(7) by the jury instructions. This construction must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a death sentence.'" (Footnotes omitted.) 446 U.S. at 428. It is plain that the language of (b)(7), unless modified by restrictive jury instructions or judicial interpretation, fails to meet this test, because the language includes the phrase "outrageously or wantonly vile, horrible and inhuman," which the plurality in Godfrey found to be insufficient to imply "any inherent restraint on the arbitrary and capricious infliction of the death sentence." Id. Moreover, the plurality noted, "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 428-429.

Second, the limiting construction of (b)(7) must actually be charged to the jury at trial. Since the purpose of the sentencing standards required by both Furman v. Georgia, 408 U.S. 238 (1972) and Gregg v. Georgia, 428 U.S. 153 (1976) is to "channel the sentencer's discretion," Godfrey v. Georgia, supra, 446 U.S. at 428 (emphasis supplied), the Court makes plain that the constitutional infirmity in Godfrey was that the sentencer's discretion had not been channeled, for the view that nearly every murder was covered by this aggravating circumstance

> "...may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of §(b)(7)'s terms."

446 U.S. at 429.[6]

Third, the limiting construction of (b)(7) must also be applied by the Georgia Supreme Court in its review of the sentence on appeal. Because the state supreme court in any death penalty statutory scheme is a constitutionally necessary safeguard "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, supra, 428 U.S. at 204, the state supreme court must be an independent guarantor that no death sentence is imposed arbitrarily, without the clear guidance of jury discretion. For this reason, the Georgia Supreme Court must, at the very least, apply an appropriately limited construction of (b)(7) in its review of the evidence supporting a death sentence. This was precisely what the Georgia Supreme Court failed to do in Godfrey, however, for it affirmed Mr. Godfrey's sentence despite the fact that Mr. Godfrey's crime did not satisfy any of the limiting criteria imposed on (b)(7) by prior decisions of the Georgia Supreme Court. 446 U.S. at 431-432. Under these circumstances, Godfrey's sentence had to be vacated, for there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433.

B. The trial court failed to charge the jury with a properly limited construction of (b)(7)

As noted in Mr. Collins' state habeas corpus petition, the only instruction to the jury by the trial court concerning the (b)(7) aggravating circumstance, or concerning either aggravating circumstance for that matter, was the following:

> "The State contends that two statutory aggravating circumstances exist in this case

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[6] In the trial court's instructions in Godfrey, the judge had simply read the statutory language of §(b)(7) to the jury. No attempt was made to explain or limit the application of the language. 446 U.S. at 426.

> which would authorize consideration of the death penalty. . . . Secondly, the State contends that the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind."

(T, 377) Not only was the court's charge on (b)(7) simply a recitation of the statutory language; the statutory language was not even completely recited, for the last phrase of the (b)(7) language -- "or an aggravated battery to the victim" -- was completely omitted. This charge to the jury failed to meet the first and second conditions imposed by Godfrey.

As noted above, Godfrey requires, first, that a limiting construction be placed upon (b)(7) by the instructions to the jury, and second, that the limiting construction actually be charged to the jury at trial. Unquestionably, no such limiting construction was placed upon (b)(7) or charged to the jury at Mr. Collins' trial. That the Georgia Supreme Court may later apply a limiting construction of (b)(7) to the facts of Petitioner's case in order to uphold the death sentence cannot compensate for this failure in the instructions to the jury. As Godfrey notes, sentencing discretion must be channeled by "'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a death sentence.'" 446 U.S. at 428. Thus, only when the sentencer's discretion is sufficiently guided does the process for imposing a death sentence become rationally reviewable. Henry v. Wainwright, 661 F.2d 56, 59 (5th Cir. 1981); Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, _____ U.S. _____ (October 5, 1981)(No. 81-89). When the sentencer's discretion is not adequately guided, that exercise of discretion simply cannot be reviewed in a rational manner, no matter what the reviewing court thinks about the facts of the case "fitting into" a limited construction of (b)(7). Henry v. Wainwright, supra; Stephens v.

Zant, supra. Under such circumstances, the very fact that an unlimited instruction on (b)(7) was given may be the sole reason for the jury's imposition of a death sentence. Godfrey v. Georgia, supra, 446 U.S. at 429. To conclude that such an erring instruction is harmless is to engage in a "guessing game" which risks the imposition of the death penalty in the face of plain Godfrey error. Such speculation is constitutionally intolerable in a death penalty case. See Eddings v. Oklahoma, _____ U.S. _____ (January 19, 1982)(No. 80-5727, slip opinion, at 2-3, Justice O'Connor concurring).

Thus, the trial court's failure to appropriately limit (b)(7) in its charge to the jury absolutely forecloses the use of (b)(7) as an aggravating circumstance supporting the death penalty in Mr. Collins' case.

C. In its review of Mr. Collins' sentence on remand, the Georgia Supreme Court failed to examine the actual charge to the jury on (b)(7) and also applied a construction of (b)(7) upon review which itself was insufficiently limited

The Georgia Supreme Court committed two errors in its review of the application of (b)(7) in Mr. Collins' case following the remand of Mr. Collins' case by this Court. First, the Georgia Supreme Court failed to examine the question of whether the jury in this case received an appropriately limited instruction concerning the (b)(7) aggravating circumstance. On the basis of the preceding discussion, had the court examined this question, it would have found unquestionably that there was no limited construction of (b)(7) charged to the jury.

Second, despite its failure to examine the question of the instruction as charged to the jury at Mr. Collins' trial, the Georgia Supreme Court, nonetheless, went on to "review" the application of that circumstance to the facts of Mr. Collins' case. On the basis of the preceding discussion, Mr. Collins submits that by doing this, the Georgia Supreme Court was engaged

in a meaningless exercise, for under circumstances where no limiting construction had been given to (b)(7) in the jury charge, that error could not be saved by an application of a more limited construction by the Georgia Supreme Court in its review of the case. Nonetheless, even if the Georgia Supreme Court's exercise were not meaningless, the construction of (b)(7) applied to Mr. Collins' case was also insufficiently limited.

As noted by the Georgia Supreme Court in its opinion on remand, the court applied the limited construction of (b)(7) which it had discussed in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). In Hance, the court held that a particular application of (b)(7) will be upheld if the evidence satisfied the first major component of (b)(7) (the homicide was "outrageously or wantonly vile, horrible or inhuman"), and if the evidence further satisfies one of the three subparts of the second major component of (b)(7) (that the homicide involved "torture, depravity of mind, or an aggravated battery to the victim"). Petitioner submits that, as applied to his case, this limited view of (b)(7) was insufficiently limited.

With respect to evidence which will satisfy the first major component of (b)(7), the court in Hance indicated that these words -- "outrageously or wantonly vile, horrible or inhuman" -- mean virtually the same thing, and they are meant to distinguish the "ordinary" homicide from those homicides for which the death penalty ought to be imposed. Such reasoning is clearly not a limiting construction of this language, but simply begs the question as to which homicides this language appropriately applies. In its opinion on remand, nonetheless, the Georgia Supreme Court found that the murder involved in this case was different from "ordinary murders" in the following manner.

> "The evidence in this case clearly establishes that the victim was not related to the appellant. She was not threatening the appellant nor was she causing any emotional trauma to him. The

> appellant left the scene and attempted in every manner to avoid the prosecution for his crime."

Collins v. State, supra, 271 S.E.2d at 353. These facts simply do not distinguish this murder from any other "ordinary" murder, for in the "ordinary" murder, the victim will not be related to the defendant, the victim will likely not be threatening the defendant nor causing any emotional trauma to him, and the defendant will not immediately turn himself in. In fact, the ordinary murder seems to be precisely that which the Georgia Supreme Court, in Petitioner's case, declared "not ordinary."

With respect to the second component of (b)(7), the Georgia Supreme Court on remand found that the evidence satisfied that part of the second component indicating that the murder had been committed by "torture." The court found torture here by virtue of the "serious sexual abuse" committed upon the victim prior to her death. Collins v. State, supra, 271 S.E.2d at 354. However, when the facts of this case are examined, the facts do not show beyond a reasonable doubt that Roger Collins engaged in "serious sexual abuse" of the victim prior to her death. The facts do show that Roger Collins engaged in sexual intercourse with the victim, but the facts at least raise a reasonable doubt as to whether that sexual intercourse was rape or consensual intercourse. See pp. 2 - 3, supra. Even if the intercourse were deemed to be rape, however, the intercourse was not the same as "serious sexual abuse," for it was done without additional injury, or personal threat by Mr. Collins, to the victim. In fact, all indications were that the victim did not feel "abused" until she had intercourse with the other two men involved in this transaction. (T, 140-157) Thus, with respect to Roger Collins personally, the facts adduced at trial did not show beyond a reasonable doubt that he had engaged in "serious sexual abuse" of the victim prior to her death.

For these reasons, even when a "limited" construction of (b)(7) is applied to Mr. Collins' case, (b)(7) still provides no principled basis upon which to differentiate the imposition of the death sentence upon Roger Collins from the non-imposition of the death sentence upon others.

II. UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, THE GEORGIA CAPITAL SENTENCING SCHEME MUST REQUIRE THE SENTENCER TO MAKE FINDINGS CONCERNING MITIGATING CIRCUMSTANCES IN ORDER TO MAKE THE PROCESS FOR IMPOSING A DEATH SENTENCE RATIONALLY REVIEWABLE

When a jury imposes a death sentence, as it did here, the only specific findings it makes are as to aggravating circumstances. The jury is not required to list the mitigating circumstances it also considered; rather, the jury is simply required to complete and sign the following form statement, as it did here:

> "We, the jury, recommend the death penalty, and find the following statutory aggravating circumstances: [the specific aggravating circumstances found are then listed]."

(T, 379, 383) Pursuant to this form statement, a reviewing court cannot determine whether the jury considered and properly or improperly rejected various mitigating circumstances, considered and found various mitigating circumstances but also found that they did not outweigh the aggravating circumstances, or considered nothing at all concerning mitigation. Because of this gap in the record made of the jury's exercise of sentencing discretion, that exercise of discretion is essentially unreviewable. Because this Court has consistently required that the process by which a death sentence is imposed be rationally reviewable,[7] the Court should grant certiorari to consider the problem of unreviewability created by this defect in the Georgia capital sentencing scheme.

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[7] Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Godfrey v. Georgia, supra, 446 U.S. at 428.

The problem created by the foregoing practice arises when the Georgia Supreme Court attempts to undertake its review functions mandated by Ga. Code Ann. §27-2537(c)(to determine whether the death sentence was imposed under the influence of passion, prejudice, or some other arbitrary factor and whether the death sentence is excessive) and by Ga. Code Ann. §27-2537(i) (to determine whether the death sentence is factually substantiated). In order to review the jury's exercise of discretion with respect to the sentence determination, the Court must know what the jury found with respect to mitigating circumstances in and of themselves. Did they ignore certain facts of record? Did they take such facts into account but fail to give them sufficient weight? Did they disbelieve certain facts which a jury operating rationally would have believed? Without the benefit of the jury's findings concerning mitigating circumstances, the reviewing court simply cannot honestly determine whether the evidence supports the jury's recommendation of a death sentence. A major portion of the jury's exercise of discretion is simply concealed from the view of the Georgia Supreme Court.

The constitutional defect in such a statutory scheme thus becomes clear. In the absence of specific findings which would fully disclose why the jury imposed a death sentence, the Georgia Supreme Court must scan the record and make its own findings as to mitigation. This is precisely the evil condemned, although in a different context, in Presnell v. Georgia, 439 U.S. 14, 15-16 (1978), for it diverts the Supreme Court from an examination of the jury's exercise of discretion, which is the critical examination under current capital-sentencing procedures. See, e.g., Godfrey v. Georgia, supra, 446 U.S. at 428-429 (The State must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a death sentence.'")(Emphasis supplied). "ith such concealment of jury

discretion in the record, Georgia's capital-sentencing scheme must fail.

> "Since the State must administer its capital-sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250, 49 L.Ed.2d 913, 96 S.Ct. 2960, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the ... capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia."

Gardner v. Florida, 430 U.S. 349, 361 (1977)(emphasis supplied).

CONCLUSION

For the reasons expressed herein, the Petitioner, Roger Collins, respectfully requests that this Court grant his petition for a writ of certiorari to the Georgia Supreme Court.

March 2, 1982

Respectfully submitted,

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3) Mr. Daryl A. Robinson, Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, S. E., Atlanta, GA 30334
4) Warden Walter D. Zant, GD&CC, POB 3877, Jackson, GA 30233
5) Department of Offender Rehabilitation, 800 Peachtree St., N.E. Atlanta, GA 30365, Attn: Mr. Micky Camp
6) Judge Willis B. Hunt, Jr., Houston County Courthouse, Perry, Georgia 31069
7) Mr. Theron Finlayson, District Attorney, Houston County Courthouse, Perry, Georgia 31069
8) Mr. Tommie S. Hunt, Clerk Superior Court, Houston County Courthouse, Perry, Georgia 31069

Re: Roger Collins
vs. Walter D. Zant, Warden
No. 5007

Gentlemen:

Enclosed herewith is a copy of the ORDER signed by Judge Crumbley on August 20, 1981, and filed in this office on August 21, 1981, in the above stated case.

Yours truly,

Audrey R. Halley
AUDREY R. HALLEY
Chief Deputy Clerk

/arh

encl.

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

ROGER COLLINS,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	FILE NO. 5007
WALTER D. ZANT, SUPERINTENDENT GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Houston County. Collins was convicted of Murder and Rape. He was sentenced to death for Murder and fifteen years imprisonment for Rape. His convictions and sentences were affirmed by the Supreme Court. Collins v. State, 243 Ga. 291 (1979). The Supreme Court of the United States vacated the death sentence and remanded the case for further consideration in light of Godfrey.[1] Upon reconsideration the Supreme Court reaffirmed the death sentence. Collins v. State, 246 Ga. 261 (1980). The United States Supreme Court denied certiorari.

The Petition contains 44 numbered paragraphs, of which 26 allege susbantive claims for relief (17-42).

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[1] Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

The Court will rule on those claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition. However, Petitioner has not presented evidence or argument on 10 points (18-21, 28, 34-35, 37, 39, 42). If these issues have already been decided by the Supreme Court, then there is no problem with abandonment. To the extent this Court has anything on which to rule, they are deemed abandoned.

The record in this case consists of the depositions of Petitioner, Lois Collins, James J. Daly, Jr., Herbert L. Wells; the affidavits of Judith Bunker, Wynees Brinson, Faye Wilson; and the record and transcript of Petitioner's trial in the Houston County Superior Court.

17.

In paragraph 17, Petitioner contends he was denied effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights and corresponding rights under the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented at trial by James J. Daly, Jr., then Public Defender of the Houston Judicial Circuit. (Daly Depo. 3). Herbert L. Wells, an attorney in Perry, Georgia, was appointed to assist Daly. (Wells Depo. 4-5).

Counsel filed numerous pretrial motions (R. 6-23, 25-33, 46-51), with Wells assisting Daly in preparing the motions (Wells Depo. 6). Daly talked with the

doctors at Central State Hospital who had examined Petitioner, and was successful in moving for an independent psychiatric exam. (Daly Depo. 24). He also talked with the medical examiner. (Daly Depo. 33). Wells said that they received no cooperation whatsoever from any State's witnesses except they were given one interview with Styles. (Wells Depo. 44). They talked to all the witnesses who would talk to them. (Wells Depo. 67). No clothing was included in what was made available under the Brady motion so that no independent analysis could have been made. (Wells Depo. 20). As to evidence concerning the fatal blows to the victim, Daly said the only way to get this issue before the jury was through the testimony of Petitioner, and Petitioner was quite definite about refusing to testify despite Daly's contrary advice. (Daly Depo. 35-36).

Daly was primarily responsible for developing proof for the sentencing phase of trial. (Daly Depo. 6). He said the sentencing phase was anticipated well in advance because all along he and Wells thought Petitioner would be convicted. Id. Part of his preparation consisted of numerous visits with Petitioner. Id. The overall strategy was to show Durham was the "bad guy, trigger man, prime mover." Id. Though Petitioner offers conflicting testimony on the issue of availability of character witnesses (R. Collins Depo. 4, 27-29; L. Collins Depo. 11; Brinson and Wilson Affidavits), Counsel said Petitioner was unable at the

time of trial to provide them with any names of character witnesses or former employers (Daly Depo. 6-7; Wells Depo. 65-66). Counsel did discuss with Petitioner's mother the possibility of her testifying, but Petitioner did not really want to involve her. (Daly Depo. 8). Counsel decided Petitioner's mother would not have much credibility, given her background and her relationship with Durham, and that she would do more harm than good. (Daly Depo. 8-9).

At the trial, Counsel cross-examined State's witnesses (T.T. 55, 68; 77; 132; 174; 185; 202; 205; 215; 229; 240; 261); made motions (T.T. 4; 27; 112; 294; 341; 344); gave argument during the guilt/innocence phase (T.T. 311-19); gave argument during the sentencing phase (T.T. 366-376); and presented Petitioner in his own behalf at the sentencing phase. (T.T. 348).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's counsel easily meet this test. Both attorneys prepared for and advocated Petitioner's cause in a reasonably effective manner considering

the difficulty of the case and the lack of material to work with. The effort counsel put forth was certainly reasonably effective within the meaning of the standard.

Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1968); Jones v. State, 243 Ga. 820 (1979). Such allegations as counsel carelessly cross-examined a witness or failed to present an effective closing argument constitute the kind of hindsight which has never provided the basis for ineffective assistance claims. MacKenna v. Ellis, supra; Pitts v. Glass, supra.

Accordingly, the Court finds this claim for relief to be without merit.

22.

The Supreme Court has already decided that the statements to which Petitioner objects were clearly part of the res gestae and were admissible. Collins v. State, 243 Ga. at 295.

23.

The Supreme Court has already concluded that the hearsay statements of Durham were admissible as part of the res gestae. Collins v. State, 243 Ga. at 295-296.

24.

In paragraph 24, Petitioner claims constitutional error by the trial court's failure to direct a verdict of not guilty on the charge of rape.

On direct appeal, the Supreme Court decided this issue adversely to Petitioner. Collins v. State, 243 Ga. at 297. Although the decision was rendered before Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), there is sufficient evidence from which a rational trier of fact could find Petitioner guilty of rape beyond a reasonable doubt. Jackson v. Virginia, supra.

25.

In paragraph 25, Petitioner contends he was denied due process of law when the trial court allegedly erred in charging the jury on reasonable doubt. Specifically, Petitioner claims the trial court overstated the degree of uncertainty required for reasonable doubt by using the words, "wavering, unsettled, and unsatisfied."

The Court finds this allegation to be without merit.

26.

In paragraph 26, Petitioner alleges the charge to the jury concerning criminal intent was impermissibly burden-shifting under Sandstrom v. Montana, 422 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

FINDINGS OF FACT

The jury was instructed as follows:

> "A presumption is a conclusion which the law draws from given facts. Each of the following presumptions that I am going to give you is rebuttable; that is, each is subject to being

overcome by evidence to the contrary. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention but the trier of facts may find such intention upon consideration of the acts, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is tried.

Criminal intent is a necessary ingredient of crime and proof of that intent must exist before a conviction is authorized. Whether it has been shown is ordinarily for the jury to decide. It may be demonstrated by the acts and conduct of the defendant, it may be inferred from the proven circumstances or it may be presumed where it appears to be the necessary or probable consequence of the defendant's acts."

(T.T. 327-328).

CONCLUSIONS OF LAW

Sandstrom is readily distinguished on the ground that there the jury "were not told the presumption could be rebutted." 61 L.Ed.2d at 46. Here, the trial court clearly instructed the jury the presumption could be rebutted.

The charge on criminal intent merely created a permissibe presumption which the jury was free to apply or reject. Such permissive presumptions are valid. Skrine v. State, 244 Ga. 520 (1979).

Accordingly, the allegation in paragraph 26 is found to be without merit.

27.

In paragraph 27, Petitioner claims his Fifth and Fourteenth Amendment rights were violated by the admission at trial of his statements to officers of the Houston County Sheriff's Department.

FINDINGS OF FACT

Petitioner was arrested on August 7, 1977, by officers of the Houston County Sheriff's Department. (M.T. 6)[2] The pretrial hearing conducted on Petitioner's Motion to Suppress, by agreement, served as the equivalent of a Jackson-Denno hearing. (M.T.5). At his initial interrogation on August 7, Petitioner was given his Miranda warnings, signed a written waiver, but gave no statement. (M.T. 9-10). At a second interview on either August 7 or 8,[3] Petitioner gave a statement concerning the charges of rape and murder. (M.T. 11, 30). Petitioner was aware his statement was being recorded. (M.T. 11).

After having given his statement, Petitioner was brought before a magistrate on August 8.(M.T. 30). Upon hearing the charges against him, Petitioner requested an attorney. (M.T. 58).

On August 12, officers questioned Petitioner about another case and asked him "to give us another tape on the Luster murder." (M.T. 39). Apparently some error occurred in taping the first statement so that the tape was blank. (M.T. 39, 57). Petitioner

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[2] Pretrial Motions Hearing Transcript of October 21, 1977.

[3] Of the two officers present at this interview, one officer testified it occurred August 7 (M.T. 11), while the other officer said August 8 (M.T.30).

gave them a second statement about the case. (M.T. 45-46). One officer who was present at the second taping knew Petitioner had requested an attorney four days before when appearing before the magistrate. (M.T. 59).

The trial court found that Petitioner requested an attorney in connection with his appearance before the magistrate.[4] (M.T. 95). The Court also found that as a preliminary to any statement he made, Petitioner was fully advised of his constitutional rights to an attorney. Id.

At trial, Officer Enckler testified that Defendant admitted complicity in the rape and the murder during the taped interrogation which occurred on August 7, 1977. (T.T. 254-255). The August 12 tape, taken after Defendant had requested an attorney, was played for the jury (T.T. 258). (For content of the statement, see State's Exhibit 42).

CONCLUSIONS OF LAW

The issue presented is whether the admission by the Court of the taped statement taken on August 12, 1977, violated Defendant's Fifth and Fourteenth Amendment rights against self incrimination.

The recent case of Edwards v. Arizona, 29 Crim. L. Rep. (BNA) 3037 (U.S. May 18, 1981) held that, where an accused has invoked his right to counsel, a valid waiver of that right cannot be established by showing only that he responded to police initiated

---

[4] The evidence is unclear as to whether the appearance was an arraignment or a commitment hearing.

interrogation after being again advised of his rights.

In this case, Petitioner requested a lawyer and was subsequently interrogated at the instance of the police. The same officer who interrogated him on August 12, 1977, and took the taped statement was present when he requested counsel when taken before the magistrate. Therefore, it is clear that the officer took the taped statement after Defendant had requested counsel.

The trial court, therefore, did commit error in admitting the taped statement of August 12, 1977. It was taken in violation of the Fifth and Fourteenth Amendment rights of Petitioner under the authority of Edwards v. Arizona, supra.

However, the Court rules that the error was harmless. The trial court properly admitted testimony of the officer concerning the first statement given by Defendant on August 7, 1977 (T.T. 254-255). This statement clearly implicated the Defendant in the rape and murder. The erroneously admitted taped statement of August 12, 1977 (see State's Exhibit 42) is inculpatory but less so than the officer's testimony concerning the earlier statement. On the erroneously admitted tape, Defendant/Petitioner denied participating in the rape and denied directly committing the murder. While this statement, standing alone, would certainly be contrary to Defendant/Petitioner's interest because it placed him at the scene and would make him at least a party to the crime of murder, when viewed in the

context of the earlier statement that he had actually committed the rape and murder (see T.T. 254-255), the taped statement is actually helpful rather than harmful to the Defendant/Petitioner. In fact, his counsel might well have decided not even to object to the taped statement after the officer's testimony concerning the earlier statement had been admitted. The admission of the taped statement, while erroneous under Edwards v. Arizona, supra, in all likelihood helped Defendant more than it harmed him in the eyes of the jury.

Accordingly, the Court finds beyond a reasonable doubt that the erroneously admitted tape in all likelihood did not contribute to the verdict of guilty or the imposition of the death penalty. For this reason, the Court rules that the conviction should not be set aside.

29.

The Supreme Court has already concluded there was sufficient evidence to support each element of the offense of rape and that its consideration as an aggravating circumstance was not error. Collins v. State, 243 Ga. at 297. The Court expressly upheld the Ga. Code Ann. §27-2534.1(b)(2) aggravating circumstance involving rape. Collins v. State, 246 Ga. at 262.

Petitioner further claims that the consideration of rape as a capital felony for purposes of the (b)(2) aggravating circumstance is an unconstitutional

act of judicial legislation by the Supreme Court. The Court finds this argument to be without merit.

30.

In paragraph 30, Petitioner claims the jury instruction on the (b)(7) aggravating circumstance was improper and violated his Eighth and Fourteenth Amendment rights.

The Supreme Court has already reconsidered Petitioner's sentence in light of Godfrey v. Georgia, supra, and concluded the (b)(7) aggravating circumstance was properly applied. Collins v. State, 246 Ga. 261 (1980). Implicit in the finding that (b)(7) was properly applied would be the fact that the jury charge on (b)(7) was not improper.

Accordingly, this allegation is found to be without merit.

31.

See paragraph 30.

32.

In paragraph 32, Petitioner alleges the trial court failed to define the role of mitigating circumstances sufficiently in the jury charge during the sentencing phase. Specifically, Petitioner claims that by telling the jury they "should consider" any mitigating circumstances, the trial court failed to require the jury to give full consideration to mitigating circumstances.

The Court finds this argument to be without merit.

33.

In paragraph 33, Petitioner claims constitutional deprivation by the failure of the trial court to require the jury to give independant mitigating weight to the facts adduced concerning the character and record of Petitioner and circumstances surrounding the crime.

The Court finds this argument to be without merit.

36.

In paragraph 36, Petitioner claims constitutional deprivation by the failure of the trial court to require to make findings of fact with respect to mitigating circumstances.

There is clearly no such requirement under Georgia's death penalty statute. Accordingly, this allegation is found to be without merit.

38.

In paragraph 38, Petitioner alleges his Eighth and Fourteenth Amendment rights were violated by the failure to the Superme Court to review his sentence and determine it falls into the category of "most extreme cases" which warrant the death penalty.

The Supreme Court conducted a sentence review on direct appeal, Collins v. State, 243 Ga. at 299, and a second review upon remand, Collins v. State, 246 Ga. at 261. The Court found "material differences between Godfrey and the case under review, which

distinguish this murder from the murder in Godfrey and from other 'ordinary' murders for which the death penalty is not appropriate." Id.

Accordingly, this allegation is found to be without merit.

40.

Having found both aggravating circumstances valid in paragraphs 29 and 30, the Court finds no merit in Petitioner's allegation of constitutional deprivation by failure of the Supreme Court to reverse Petitioner's death sentence and remand his case for a new sentencing proceeding.

41.

In paragraph 41, Petitioner claims he was deprived of his right to due process by the failure of one or more jurors to remain awake during the course of the trial.

This ground is without merit. There has been no showing that the jury missed anything or that Defendant was prejudiced by proceedings at a late hour or that the Court did not respond promptly to the suggestion that some of the jurors were tired.

WHEREFORE, all allegations of the Petition having been found to be without merit, said Petition is denied.

This 20 day of August, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 1795

SUPREME COURT OF GEORGIA

ATLANTA, December 3, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ROGER COLLINS V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1 (b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(Acts 1973, pp. 159, 165.)

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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1981

NO. 81 6304

ROGER COLLINS,

Petitioner,

-v-

WALTER D. ZANT,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, ROGER COLLINS, who is now held in a Georgia penitentiary, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's affidavit in support of this motion is attached hereto. Petitioner has previously proceeded in forma pauperis in the courts of Georgia. See Notice of Appeal filed in the Superior Court of Butts County (Georgia) dated September 21, 1981.

Richard H. Burr, III

Richard H. Burr, III
Southern Prisoners' Defense
Committee
Box 120636, Acklen Station
Nashville, Tennessee 37212
(615) 383-9610

COUNSEL FOR PETITIONER

RECEIVED
MAR 2 1982
Office of the CLERK
SUPREME COURT U.S.

IN FORMA PAUPERIS AFFIDAVIT

IN THE

SUPREME COURT OF THE UNITED STATES

ROGER COLLINS
(Petitioner)

v.

WALTER D. ZANT
(Respondent(s))

AFFIDAVIT IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, ROGER COLLINS, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [✓]

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received. don't Recall

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes [ ] No [✓]

   b. Rent payments, interest or dividends? Yes [ ] No [✓]

c. Pensions, annuities or life insurance payments?
Yes [ ] No [✓]

d. Gifts or inheritances? Yes [ ] No [✓]

e. Any other sources? Yes [ ] No [✓]

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own cash, or do you have money in a checking or savings account? Yes [✓] No [ ] (Include any funds in prison accounts.) If the answer is "yes," state the total value of the items owned. 27.00 (Dollars $27)

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [✓]
If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. —

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Roger Collins
(Petitioner's signature)

State of Georgia

County of Butts

ROGER COLLINS, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

(Name of Petitioner)

Roger Collins
Signature of Petitioner
(Required as to each petitioner)

Subscribed and sworn to before me this 25th day of Feb, 1982.

C W Conner
Notary Public or other person authorized to administer an oath

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $ 27.00 on account to his credit at the Ga. Diag. Ctr. institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said above institution: None

David Cawthon Acctg Tech. I
Authorized Officer of Institution
2/24/82

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APR 5 1982
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SUPREME COURT, U.S.

NO. 81-6304

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROGER COLLINS,

Petitioner,

v.

WALTER D. ZANT,
SUPERINTENDENT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

DARYL A. ROBINSON
Assistant Attorney General
Counsel of Record

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

QUESTIONS PRESENTED

1.

The death penalty was properly imposed and reviewed in light of Godfrey v. Georgia, 446 U.S. 961 (1980).

2.

Georgia law allows the jury to consider a broad range of mitigating evidence, and does not require specification.

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Statutes Cited:

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NO. 81-6304

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROGER COLLINS,

Petitioner,

v.

WALTER D. ZANT,
SUPERINTENDENT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Roger Collins was convicted in the Superior Court of Houston County, Georgia, for raping and bludgeoning to death Delores Luster. He was sentenced to die for the murder; imprisonment for fifteen years was imposed for the rape. (R. 54-55, 60). A codefendant, William Durham, was separately tried and convicted; he was given consecutive sentences of life and fifteen years.

Collins' conviction and sentence were affirmed by the Supreme Court of Georgia in Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979). The evidence adduced at Collins' trial, recounted in the appellate decision, was that Collins (1) coerced his victim into the automobile under a pretext of carrying her home, (2) threatened her if he contracted a veneral disease, (3) upon reaching the pecan orchard where the crimes were committed removed the rear seat from the automobile, (4) was the first to rape her, (5) removed from the automobile's trunk a jack and, with the weapon, followed as his codefendant led the victim down a dirt road away from where she had been raped, (6) returned to the car following the murder with blood-spattered feet, (7) instructed his cohorts to lie about the blood should anyone ask, (8) left his thumbprint on the murder weapon, and (9) ultimately admitted raping the victim and hitting her over the head with the jack. Collins v. State, supra, at 291-93.

Collins petitioned this Court for a writ of certiorari which, on May 27, 1980, was granted and the case was remanded to the Supreme Court of Georgia for reconsideration in the light of Godfrey v. Georgia, 446 U.S. 961 (1980). Collins v. Georgia, Case No. 79-5188. On remand, upon reconsideration, the Supreme Court of Georgia unanimously affirmed. Petitioner thereafter

sought review in this Court which was denied on January 12, 1981. Collins v. Georgia, Case No. 80-5672.

Collins thereafter filed a petition for habeas corpus relief in the Superior Court of Butts County, Georgia, which was denied on August 20, 1981. The Supreme Court of Georgia also denied the application for a certificate of probable cause to appeal. (Collins v. Zant, Application No. 1795, denied December 3, 1981.) From the denial of relief in the courts of the State of Georgia, Collins petitions this Court again for review.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

I. THE DEATH PENALTY WAS PROPERLY IMPOSED AND REVIEWED IN LIGHT OF GODFREY v. GEORGIA, 446 U.S. 961 (1980).

The first issue presented for this Court's review is substantially the same as was presented when Collins petitioned this Court for review of his direct appeal. Essentially, he claims that the trial court did not sufficiently instruct on an aggravating circumstance and that the review conducted by the Supreme Court of Georgia was inadequate. Petitioner argues that review by the Supreme Court of Georgia on remand does not cure what he claims was an insufficiently guided jury. The implication is review by the Supreme Court of Georgia is, in effect, a de novo sentencing and the appropriate course of action would be to order new jury sentencing. If that is Petitioner's assertion, it is without support. Upon initially reviewing Petitioner's death sentence, the Supreme Court of Georgia considered the death penalty as it is required to do under Georgia law. Ga. Code Ann. § 27-2537. As required, the review was conducted. In remanding, this Court did not order the original death sentence vacated; rather, the Court vacated the judgment of the state appellate court dealing with sentence review. Therefore, on remand, the Supreme Court of Georgia was merely reconducting its appellate review of the death penalty. The state court did not reimpose the death sentence but merely reaffirmed the death sentence already imposed by the trial jury.

Petitioner contends this Court should grant certiorari to consider whether the Supreme Court of Georgia construed Ga. Code Ann. § 27-2534.1(b)(7) in an unconstitutional manner. Petitioner

seeks to discredit the Supreme Court of Georgia on remand by asserting that the state court merely found factual differences between this case and Godfrey. Yet the distinguishing of factual matters is the primary means of avoiding the arbitrary and capricious inflicting of the death penalty; only in considering the facts of each case can courts restrict the death penalty to those factual settings which justify it.

Contrary to Petitioner's assertions, since this Court decided Godfrey, the Supreme Court of Georgia has gone to great lengths to make its appellate review an elaborate and detailed process by examining each case, including the facts surrounding the offense, thoroughly. As this Court is aware, in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), the court in detail defined and explained the seventh aggravating circumstance.

In considering Petitioner's death sentence on remand in light of Godfrey, the Supreme Court of Georgia found material differences between Godfrey and Collins which distinguished Collins' act from those cases in which the death penalty is not appropriate:

> . . . The evidence in this case clearly establishes the victim was not related to the appellant. She was not threatening the appellant nor was she causing any emotional trauma to him. The appellant left the scene and attempted in every manner to avoid prosecution for his crime.
>
> As set out in the original opinion, the autopsy report showed that while

> the victim had died relatively instantaneously from a massive head injury, she also had been raped and sodomized. The evidence shows she had been sexually abused by appellant and his two codefendants prior to death. [Citations omitted.]
>
> Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, supra. Serious sexual abuse may be found to constitute serious physical abuse. [Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980)] A defendant who tortures the victim before killing the victim can be found to have a depraved mind. Hance v. State, supra.
>
> Accordingly, this court holds that the present jury was authorized to find, consistently with the United States Supreme Court's holding in Godfrey that, beyond a reasonable doubt, the murder of the victim was of a type universally condemned by civilized society as "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." [Citation omitted.]

Collins v. State, 246 Ga. 261, 261-62, 271 S.E.2d 352 (1980). Additionally, the Supreme Court of Georgia found:

> . . . This case is also of the type wherein the sentence of death rests only partially upon Ga. Code Ann. § 27-2534.1(b)(7). The jury returned a finding of two statutory aggravating circumstances. Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). In Godfrey, supra, the Supreme Court of the United States was concerned exclusively with a sentence of death resting only upon Code Ann. § 27-2534.1(b)(7). Godfrey v. Georgia, 446 U.S. [961] (1980).
>
> Therefore, under our decisions, the death penalty may also be upheld upon § 27-2534.1(b)(2). [Citations omitted.]

Id. at 262.

As for the adequacy of the instructions given the jury by the trial court, the trial court instructed in the language of Ga. Code Ann. § 27-2534.1(b)(7). In other cases, the Supreme Court of Georgia has recognized that with the exception of the term "aggravated battery," the remainder of the terms contained under section (b)(7) requires no explication. See, e.g., Gilreath v. State, 247 Ga. 814, 836, 279 S.E.2d 650 (1981); Stevens v. State, 245 Ga. 583, 586, 266 S.E.2d 194, cert. denied, ___U.S.___, 101 S.Ct. 251 (1980).

In Hance v. State, supra, the Supreme Court of Georgia found that the terms used in section (b)(7) are "words of common understanding, [having] essentially the same meaning, and are included in the statute to distinguish ordinary murders for which

the penalty of death is not appropriate, from those murders for which the death penalty may be imposed." Id. at 861. In the present case, the jury was not instructed to consider aggravated battery, hence no explication of that term was necessary.

Because of the simplicity of the terms used in section (b)(7), it was not necessary for the trial court to give further definitions of terms which the jury could readily understand.

Because the jury instructions in this case were proper, and because the review conducted by the Supreme Court of Georgia was adequate, this issue presents no reason for granting certiorari.

II. GEORGIA LAW ALLOWS THE JURY TO CONSIDER A BROAD RANGE OF MITIGATING EVIDENCE, AND DOES NOT REQUIRE SPECIFICATION.

In his second enumeration, Petitioner contends that Georgia law should be rewritten to require the jury to list the mitigating circumstances it considered. The absence of such specific listing, according to Petitioner, prevents the Supreme Court of Georgia on review from adequately considering the "jury's exercise of discretion." Such an argument assumes the function of a reviewing court on appeal is something that it is not. It is not the province of any reviewing court to enter the jury room and deliberate with the jury, to weigh the evidence considered by the jury, or to determine whether the jury gave too much or too little consideration to any factor.

As Petitioner himself apparently recognizes, it is during this phase of the sentencing deliberations that the jury exercises its discretion, albeit with some guidance, in determining what punishment is appropriate considering the circumstances of the crime and the criminal.

What this Court has held in previous cases is that relevant sentencing information, including mitigating evidence, should not be excluded from the jury's consideration. See, e.g., Green v. Georgia, 442 U.S. 95 (1979); Lockett v. Ohio, 438 U.S. 586 (1978).

As the Court noted in Lockett, supra:

> . . . the statute permitted the jury "to consider any aggravating or mitigating circumstances . . . and that

> the Georgia Supreme Court had approved "open and far-ranging argument" in presentence hearings . . . .

Id. at 606. The Georgia Legislature has elected to permit "the jury to dispense mercy on the basis of factors too intangible to write into a statute." Lockett, supra at 606, n. 14, quoting Gregg v. Georgia, 428 U.S. 153, 222 (1976).

Neither has this Court stated in the recent decision of Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982), that certain mitigating circumstances must be presented to the jury. On the contrary, this Court merely ruled that the sentencing body, whether it be a judge or jury, could not be precluded from considering any mitigating factor as a matter of law. That, in effect, was the holding in Lockett, supra.

In the present case, the trial court instructed the jury to:

> consider whether there are mitigating circumstances that would incline one to a recommendation of life imprisonment in spite of the aggravating circumstances. Mitigating circumstances are those which do not constitute a justification or excuse for the offense but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame. The youthful age of defendant is, for example, a mitigating factor which you might consider.

(T. 378)

Thus, the jury was appropriately instructed by the trial court to consider mitigating evidence and it must be assumed that the jury followed these correct instructions. An appellate court should do no more than insure that the evidence before the jury is proper, that no appropriate evidence has been excluded, and that the instructions given to the jury are correct. All those occurred in this case; the second ground presents no reason for granting the writ of certiorari.

CONCLUSION

No sufficient reason having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AFFIDAVIT OF TIMELY FILING

PURSUANT TO RULE 28(2)

I, Daryl A. Robinson, a member of the Bar of this Court and counsel of record in Case No. 81-6304, Collins v. Zant, hereby certify in accordance with Rule 28(2) of the Rules of this Court that on April 1, 1982, there was deposited in the United States Post Office, Capitol Hill Annex, with sufficient postage prepaid, Respondent's brief in opposition addressed to Honorable Alexander Stevas, Clerk, Supreme Court of the United States.

Both the response filed with this Court and the service copy to counsel for Petitioner were mailed within the permitted time.

This 1st day of April, 1982.

Daryl A. Robinson

DARYL A. ROBINSON

Sworn to and subscribed before me

this 1st day of April, 1982.

NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia State at Large
My Commission Expires Nov. 16, 1984